

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Kelly Lyon	Team: Squad #10	CCRB Case #: 201908463	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Wednesday, 09/18/2019 8:00 PM	Location of Incident: 254 Kingston Avenue	Precinct: 77	18 Mo. SOL 3/18/2021	EO SOL 11/2/2021	
Date/Time CV Reported Wed, 09/18/2019 11:04 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 09/25/2019 11:04 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. SGT Kevin McCarthy	03347	949290	077 PCT
2. POM Christian Lopez	24864	955083	077 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Malcolm Brissettortiz	11357	960281	077 PCT
2. LT Eric Delman	00000	922228	077 PCT
3. POM Matthew Fagan	12114	954785	077 PCT
4. POM Ariel Vargas	15900	962146	077 PCT
5. POM Taylor Marino	09677	961915	077 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Kevin McCarthy	Abuse: Sergeant Kevin McCarthy stopped § 87(2)(b)	
B.POM Christian Lopez	Abuse: Police Officer Christian Lopez stopped § 87(2)(b)	
C.POM Christian Lopez	Abuse: Police Officer Christian Lopez frisked § 87(2)(b)	
D.SGT Kevin McCarthy	Abuse: Sergeant Kevin McCarthy frisked § 87(2)(b)	
E.POM Christian Lopez	Abuse: Police Officer Christian Lopez searched § 87(2)(b)	
F.POM Christian Lopez	Abuse: Police Officer Christian Lopez failed to provide § 87(2)(b) with a business card.	

Case Summary

On September 18, 2019, § 87(2)(b) filed this complaint with IAB by phone. It was received at the CCRB on September 25, 2019, under IAB log § 87(2)(b).

On September 18, 2019, at approximately 8:00 p.m., in the vicinity of 254 Kingston Avenue in Brooklyn, § 87(2)(b) was stopped by Sgt. Kevin McCarthy and PO Christian Lopez of the 77th Precinct (**Allegations A and B: Abuse of Authority – Stop**, § 87(2)(g) (Sgt. McCarthy has since been transferred to the 75th Detective Squad). PO Malcolm Brissettortiz, PO Matthew Fagan, PO Taylor Marino, PO Ariel Vargas, and Lieutenant Eric Delman of the 77th Precinct arrived immediately after and witnessed the interaction. Under Sgt. McCarthy’s supervision, PO Lopez frisked § 87(2)(b) (**Allegations C and D: Abuse of Authority – Frisk**, § 87(2)(g)). After the frisk, PO Lopez looked inside of the black plastic bag that § 87(2)(b) was carrying and searched his pockets (**Allegation E: Abuse of Authority – Search of person**, § 87(2)(g)). After Sgt. McCarthy and PO Lopez let § 87(2)(b) go, Sgt. McCarthy offered § 87(2)(b) a business card and PO Lopez did not (**Allegation F: Abuse of Authority – Failure to provide RTKA card**, § 87(2)(g)).

This incident resulted in no summonses or arrests.

There were seven body-worn camera videos (**BR 01, BR 02, BR 03, BR 04, BR 05, BR 06, BR 07**; *videos* and **BR 08**; *summaries*) and relevant portions are discussed below.

Findings and Recommendations

Allegation (A) Abuse of Authority: Sergeant Kevin McCarthy stopped § 87(2)(b)

Allegation (B) Abuse of Authority: Police Officer Christian Lopez stopped § 87(2)(b)

Allegation (C) Abuse of Authority: Police Officer Christian Lopez frisked § 87(2)(b)

Allegation (D) Abuse of Authority: Sergeant Kevin McCarthy frisked § 87(2)(b)

Allegation (E) Abuse of Authority: Police Officer Christian Lopez searched § 87(2)(b)

It was undisputed that Sgt. McCarthy and PO Lopez stopped § 87(2)(b) after responding to a radio run for a burglary at 1153 Lincoln Place in Brooklyn. Officers were looking for a lookout who was described as a Black male, 17 to 18 years old wearing a black hoodie and red pants. § 87(2)(b) was wearing a black long-sleeved shirt, a black hat, and red pants.

§ 87(2)(b) consistently stated (**BR 09, BR 10, and BR 11**) that he was stopped and frisked by Sgt. McCarthy and was told that he fit the description of a crime committed nearby. § 87(2)(b) is a Black and Hispanic male who was 30 years old at the time of this incident. He was wearing a black long sleeved-shirt with the word Fila on the right sleeve underneath a black short sleeved shirt, red pants with yellow, black, and purple stripes, and a black “dad hat” (a type of baseball cap) with a rose on it.

§ 87(2)(b) elaborated in his phone (**BR 10**) and verified statements (**BR 11**) that he had just exited the 3 train on Kingston Avenue and Eastern Parkway and headed north on Kingston Avenue toward Saint John’s Place. § 87(2)(b) was holding an opaque black plastic bag in his left hand which contained his birth certificate, license, and social security card. § 87(2)(b) was on his way to his father’s house to make copies of his documents. He was walking at a quick pace, his normal pace, and holding his phone in his right hand. § 87(2)(b) had a thick square shaped wallet and his keys, which consisted of four keys and several key rings in one of his pockets.

As § 87(2)(b) approached Saint John’s Place, he heard whispering from behind him. § 87(2)(b) believed he heard someone say, “I think that’s the guy.” Then four officers pushed § 87(2)(b) up against the wall of 254 Kingston Avenue. § 87(2)(b) did not know which of the four officers were holding him against the wall and which of the four officers frisked him and entered his pockets. An officer frisked § 87(2)(b) waist, torso, inner thighs, and groin. § 87(2)(b) said, “That’s not fair that you guys can just put your hands by my balls.” Sgt. McCarthy said, “Well you can blame every other drug dealer in the New York State system because that’s where they keep their drugs.” § 87(2)(b) unable to say with absolute certainty that Sgt. McCarthy was the one who frisked his groin, but he believed it was Sgt. McCarthy.

One of the officers took his keys out of his pocket and then put them back. An officer asked § 87(2)(b) whether he had any weapons. An officer looked inside of § 87(2)(b) bag and took out his passport. § 87(2)(b) spoke in an elevated volume and was frustrated throughout the interaction. Officers told § 87(2)(b) that they had the right to frisk him because there was a robbery in the neighborhood, and § 87(2)(b) red pants fit the description of the suspect in the robbery. Officers never asked § 87(2)(b) for consent to frisk him or search him. § 87(2)(b) did not observe any other Black individuals in the vicinity of the incident. Sgt. McCarthy gave § 87(2)(b) a business card at the conclusion of the interaction.

Sgt. McCarthy (**BR 12**) and PO Lopez (**BR 13**) consistently stated that they received a radio run for a burglary in progress. The radio gave a description of a lookout who was a Black male, wearing a black hoodie and red pants. Sgt. McCarthy added that there were two additional individuals involved in the burglary and PO Lopez added that the individuals were 17 to 18 years old. Within minutes, while Sgt. McCarthy and PO Lopez were canvassing the areas, another radio transmission went over stating that another unit observed an individual matching the description of the individual wearing a black hoodie and red pants and he was fleeing the area. Sgt. McCarthy added that he thought the unit was chasing the individual because they sounded excited and were yelling over the radio. PO Lopez added that the individual was seen walking northbound on Kingston Avenue toward Saint John's Place.

PO Lopez and Sgt. McCarthy had been riding in two separate vehicles. PO Lopez stated (**BR 13**) that when he arrived on Kingston Avenue, he pursued § 87(2)(b) on foot. § 87(2)(b) was the only individual in the vicinity wearing red pants. PO Lopez stopped § 87(2)(b) and explained to him that he stopped him because he was close to the vicinity of the crime and matched the description. § 87(2)(b) became irate and was talking in a loud voice while PO Lopez provided an explanation for the stop.

Sgt. McCarthy stated (**BR 12**) that when he arrived on scene, multiple officers from his unit were on foot pointing northbound saying, "That's the male." Sgt. McCarthy exited his vehicle and began running up the middle of the block. Sgt. McCarthy observed § 87(2)(b) a Black male wearing a black hoodie with white lettering on it and red pants. § 87(2)(b) was over a block away and Sgt. McCarthy could not see his hands. Sgt. McCarthy ran toward § 87(2)(b) and jumped on the sidewalk in front of him. § 87(2)(b) was hostile, verbally combative, and was not happy that he was being stopped.

Sgt. McCarthy (**BR 12**) and PO Lopez (**BR 13**) consistently stated that Sgt. McCarthy did not give PO Lopez instructions to stop § 87(2)(b) and they each made the decision to stop § 87(2)(b) on their own. Sgt. McCarthy and PO Lopez inconsistently described frisking § 87(2)(b). Sgt. McCarthy stated (**BR 12**) that he gave PO Lopez instructions to frisk § 87(2)(b) and did not assist him. Sgt. McCarthy did not recall where PO Lopez frisked § 87(2)(b) body and did not recall whether there was anything in § 87(2)(b) pockets. PO Lopez stated (**BR 13**) that he frisked § 87(2)(b) for weapons or anything dangerous. PO Lopez frisked the outer portion of § 87(2)(b) body. Sgt. McCarthy did not assist PO Lopez or instruct him to perform the frisk. PO Lopez initially stated that he felt on the outside of § 87(2)(b) pockets only. He believed there were keys in of § 87(2)(b) pockets. PO Lopez later stated that he believed he had pulled the keys out of § 87(2)(b) pocket to make sure it was not a weapon or something sharp that could harm him.

Sgt. McCarthy and PO Lopez inconsistently described the search of § 87(2)(b) bag. Sgt. McCarthy (**BR 12**) did not remember what kind of bag § 87(2)(b) had and did not recall anything about the bag that appeared potentially dangerous. Sgt. McCarthy did not recall PO Lopez searching the bag and did not recall instructing him to search the bag. Sgt. McCarthy explained during his interview that although he did not recall whether he was given any information that the suspect might have a weapon, burglaries are considered violent crimes and suspects are to be considered possibly armed.

PO Lopez stated (**BR 13**) that § 87(2)(b) was holding a black plastic shopping bag. The

black bag was not part of the original description provided over the radio. PO Lopez was unaware if there was anything in that bag, so he felt the outside first then peeked inside. § 87(2)(b) social security card, passport, and IDs were inside of the black bag. PO Lopez thought it was possible that there was a weapon, burglary tools, or someone else's identification in the bag. PO Lopez explained that usually when someone commits a burglary, they have some type of weapon or tool so he thought there could be something in the bag due to the nature of the crime he was responding to.

Sgt. McCarthy stated (**BR 12**) that afterward, multiple units arrived on scene. Sgt. McCarthy went over the radio numerous times and tried to get the complainant and responding officers to come over and do an identification procedure. Sgt. McCarthy was unable to get complainant to come over to do a show up. Sgt. McCarthy was not sure whether the caller was verified or anonymous. Sgt. McCarthy did not recall when he learned caller was a third-party caller. Sgt. McCarthy did not ever hear that the job was finalized over the radio while the stop was occurring. Sgt. McCarthy did not recall learning of any conclusion to the burglary. Sgt. McCarthy decided to let § 87(2)(b) go and offered him a business card which he accepted. PO Lopez stated (**BR 13**) that the original unit finalized the job as unfounded after the stop already began.

Sgt. McCarthy's memo book (**BR 14**) was consistent with his statement. Sgt. McCarthy added in his memo book that § 87(2)(b) was frisked for "violent crimes fearing weapon/use." PO Lopez's memo book (**BR 15**) was consistent with his statement.

The Stop Report § 87(2)(b) (**BR 16**) prepared by PO Lopez showed that § 87(2)(b) was stopped for the following factors: concealing or possessing a weapon, casing victim or location, acting as a lookout, proximity to the scene of a crime, and matches a specific suspect description. The narrative section showed that PO Lopez responded to a 10-31 of a residence (burglary in progress) and a description of a lookout wearing a black hoodie and red pants was provided. The first officers on scene observed a Black male in a black hoodie with white lettering and red pants fleeing location at the sight of officers. While canvassing the area, PO Lopez observed a Black male, § 87(2)(b) wearing a black hoodie with white lettering and red pants one block away from the original location. § 87(2)(b) was stopped and restrained to prevent further fight/flight and frisked for weapons due to the violent nature of the crime. No weapons were recovered, and a stop card was offered and accepted by a supervisor, Sgt McCarthy. PO Lopez noted in the stop report that § 87(2)(b) was not searched.

In an anonymous call to 911 (**BR 17; audio** and **BR 18; summary**) a female caller stated that she observed three people wearing hoodies, who jumped on top of the porch and went inside of her neighbor's home located at 1153 Lincoln Place between Albany Avenue and Troy Avenue. She did not see how they got inside of the house. There was a Black male acting as a lookout who was wearing red pants and a black hoodie and may have been 17 or 18 years old.

The radio (**BR 19; audio** and **BR 20; summary**) showed that Sector Charlie responded to a call for a 31 (burglary in progress) in which three Black males, 17 to 18 years old, wearing hoodies ran inside of the house. One jumped over a porch and another was the lookout. The lookout was in red pants and a black hoodie. At 3:36 minutes in the recording, Sector Charlie went over the radio to say that one of the males, who was wearing a black hoodie with white Nike lettering, made a left on Albany, a left on Kingston and was running toward Eastern Parkway. Another unit asked who had eyes on the individual and Sector Charlie responded at 5:44 minutes in the recording reaffirming that they saw the individual heading westbound on Lincoln toward Kingston. Central immediately replies and informed Sector Charlie that the complainant wanted to remain anonymous. At 7:10 minutes, Sector Charlie stated that they checked the callback and there was no 31. At 9:30 minutes, Sgt. McCarthy came over the radio to report one stopped and asked for the complainant. Sector Charlie stated they already marked the radio run and there was no complainant. Then Sgt. McCarthy marked the stop as a 93Q (to indicate the stop report).

PO Lopez's body-worn camera video (**BR 02; video** and **BR 08; summary**) opens with PO Lopez exiting a vehicle and running on a sidewalk. At 00:43 seconds, PO Lopez says, "NYPD, stop right here," to § 87(2)(b) who is walking on the sidewalk. § 87(2)(b) is wearing a black long-

sleeved shirt, a black hat, and red pants. PO Lopez appears to grab § 87(2)(b) shoulder and moves his back toward a door. PO Lopez says, “You got anything on you?” and § 87(2)(b) says, “No.” PO Lopez appears to pat § 87(2)(b) down but the camera angle does not capture where on § 87(2)(b) body. At approximately 00:58, PO Lopez takes the black plastic bag out of § 87(2)(b) hand. PO Lopez appears to take a clear Ziplock bag out of the black plastic bag. A passport can be seen inside the clear plastic bag. PO Lopez then opens the clear plastic Ziplock bag and removes § 87(2)(b) passport and social security card. At 1:40 minutes, Sgt. McCarthy says, “You tossed him good, right?” to PO Lopez and PO Lopez begins patting down § 87(2)(b) torso.

The other BWC captured different angles of the interaction, but was generally consistent (**BR 01, BR 03, BR 04, BR 05, BR 06, BR 07, and BR 08**).

The body-worn camera footage shows that additional officers were on scene, but they did not participate in stopping, frisking, or searching § 87(2)(b) therefore, the allegations were only pleaded against Sgt. McCarthy and PO Lopez. Although it was disputed as to whether Sgt. McCarthy verbally instructed PO Lopez to frisk § 87(2)(b) the stop had been performed together and the frisk was performed directly in front of Sgt. McCarthy, PO Lopez’s direct supervisor. Therefore, the frisk allegation was pleaded against both Sgt. McCarthy and PO Lopez. Although there were some inconsistencies in Sgt. McCarthy’s and PO Lopez’s statement regarding the search, both Sgt. McCarthy and PO Lopez explained that burglaries are violent crimes in which weapons are typically involved. The body-worn camera footage did not capture whether PO Lopez entered § 87(2)(b) pocket.

While Sgt. McCarthy asked PO Lopez whether he “tossed him good,” the BWC showed that PO Lopez began searching § 87(2)(b) prior to this vague instruction, PO Lopez said he received no instructions, and Sgt. McCarthy said he only instructed PO Lopez to frisk. Therefore, the search allegation was only pleaded against PO Lopez.

Although § 87(2)(b) description did not match perfectly to the descriptions provided over the radio, § 87(2)(b) who identifies as Black and Hispanic, was wearing a black hat with a black long sleeved shirt with white Fila lettering on the arm which was similar to the description of a black hoodie with white Nike lettering on it, especially considering the distance in which the officers first observed § 87(2)(b). Additionally, the red pants were a particularly unique identifying factor and he was the only individual seen wearing red pants in the vicinity according to PO Lopez.

In *People v. Fernandez*, 58 N.Y.2d 791 (1983) (**BR 29**) the court found that the police action, stopping an individual based on a description provided in a radio transmission, was not rendered illegal because there was an inconsistency as to some elements of the description, rather, the unusual identifying element of carrying a white shirt in the hand, coupled with geographical proximity, provided ground for reasonable suspicion in the circumstances.

The investigation was unable to come to a preponderance of evidence as to whether Sgt. McCarthy and PO Lopez heard Sector Charlie finalize the job prior to stopping § 87(2)(b) and whether Sgt. McCarthy or PO Lopez were aware that the caller was anonymous when they stopped § 87(2)(b) for the following reasons. PO Lopez’s body-worn camera footage (**BR 02; video and BR 08; summaries**) showed PO Lopez exiting his vehicle and pursuing § 87(2)(b) at 7:54:43 p.m. and Sgt. McCarthy going over the radio to show one male stopped at 7:57:13 p.m. When compared to the timestamps of the radio summary (**BR 20**), this shows that PO Lopez exited his vehicle at approximately the same time that Sector Charlie stated there was no burglary in progress and only 1:15 minutes after Central specially addressed Sector Charlie to inform them that the caller wished to remain anonymous. Sgt. McCarthy and PO Lopez consistently stated that the job was not finalized over the radio while the stop was occurring, and also consistently described the last radio transmission they both heard as the Sector Charlie describing which direction they saw the individual heading. Additionally, Sgt. McCarthy testified that he did not know whether the caller was verified or anonymous. This was consistent with the radio recording and Sgt. McCarthy’s BWC that captured him asking whether there was a complainant.

As stated above, the investigation was unable to come to a preponderance of evidence as to whether Sgt. McCarthy or PO Lopez heard that the job had already been finalized and that the caller was anonymous given that these calls went out shortly before § 87(2)(b) was stopped, § 87(2)(g)

In *People v. Mack*, 26 N.Y.2d 311(1970) (BR 21), the court found that when an officer confronts an individual who they believe reasonably suspects has committed, is committing, or is about to commit a serious and violent crime, such as a burglary, then that suspicion justifies the detention and the frisk, making it unnecessary to particularize an independent source for the belief of danger.

§ 87(2)(g)

§ 87(2)(g)

In *People v. Sanchez*, 38 N.Y.2d 72 (1975) (BR 22) the court found that a search was not permissible where the search was not based on any reasonable suspicion articulated by the police officer that he was in fear of physical danger upon feeling a “hard object,” the police possessed no information linking the defendant to possession of a weapon, and no exigent circumstances were present to justify the immediate intrusion into the defendant’s pockets.

In *People v. Reid*, 24 N.Y.3d 615 (2014) (BR 23) the court found that the search incident to arrest doctrine requires proof that at the time of the search, an arrest has already occurred or is about to occur.

§ 87(2)(g)

Furthermore, while PO Lopez felt there could be a weapon black plastic bag § 87(2)(b) had, he again provided no specifics indicating he felt a weapon and said he also thought the bag could contain burglar tools or someone else’s ID. The BWC also showed PO Lopez removing a passport and social security card from a clear plastic Ziplock back that was within the black plastic bag.

§ 87(2)(g)

Allegation (F) Abuse of Authority: Police Officer Christian Lopez failed to provide § 87(2)(b) with a business card.

It was undisputed that PO Lopez stopped, frisked, and searched § 87(2)(b) and did not provide him with a business card.

§ 87(2)(b) (BR 11), Sgt. McCarthy (BR 12), and PO Lopez (BR 13) consistently stated that Sgt. McCarthy gave § 87(2)(b) a business card at the conclusion of the interaction. PO Lopez explained (BR 13) that he did not provide his business card because his supervisor, Sgt. McCarthy, offered one and § 87(2)(b) accepted it.

NYC Administrative Code § 14-174 (BR 24) states that during a law enforcement activity, officers shall identify themselves by providing their name rank and command, provide an explanation for the law enforcement activity, and offer a business card at the conclusion of such activity. Law enforcement activity includes pedestrian stops, searches of a person, and frisks.

Patrol Guide procedure 203-09 (BR 25) states that when officers interact with a member of the public during a law enforcement activity, including a stop, frisk, and search of person, then officers are to courteously state their name, rank, shield number and command, explain the reason for the law enforcement activity, and offer a right to know business card upon the conclusion of the law enforcement activity.

Civilian and Officer CCRB Histories

- § 87(2)(b)
- Sgt. McCarthy has been a member of service for 10 years and named a subject in six additional complaints and 19 allegations, three of which were substantiated.
 - 201200526 involved a substantiated allegation of a frisk. The Board recommended command discipline and the NYPD imposed instruction.
 - 201807690 involved a substantiated allegation of videography. The Board recommended formalized training and the NYPD imposed no penalty.
 - 201901490 involved a substantiated allegation of a stop. The Board recommended command discipline B and the NYPD imposed command discipline B.
- PO Lopez has been a member of service for seven years and named a subject in six additional CCRB complaints and 13 allegations, one of which was substantiated.
 - 201703855 involved a substantiated allegation of improperly issuing summonses. The Board recommended command level instructions and the NYPD imposed formalized training.

Mediation, Civil and Criminal Histories

- This case was accepted for mediation on December 8, 2019 and returned to investigation on October 15, 2020 because § 87(2)(b) did not want to have a remote mediation.
- As of December 18, 2020, the New York City Office of the Comptroller has no record of a notice of claim being filed in regard to this incident (BR 27).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad No.: 10

Investigator:	<u>Kelly Lyon</u>	<u>Inv. Kelly Lyon</u>	<u>03/08/2021</u>
	Signature	Print Title & Name	Date

Squad Leader:	<u>Eric Rigie</u>	<u>IM Eric Rigie</u>	<u>05/04/2021</u>
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date